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No. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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CHARLES A. GULDEN AND RICHARD SAGE,
*Petitioners,*

*vs.*

MONROE MCCORKLE, CHARLES DICKERSON AND CITY OF DALLAS
*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether the Fifth Amendment, with its guarantees against self-incrimination, requires that a public employer tender immunity when it seeks to coerce testimony from its employees under threat of job loss, and if so, when. Stated another way, does the Amendment require that an employee be advised that his compelled testimony will not be used against him in subsequent criminal proceedings and, if so, at what stage of the inquiry must the employee be so advised; and does the failure to provide such assurance justify his refusal to answer?

2. Whether, though the employer's conduct in forcing an employee to submit to questioning on penalty of job loss is ineffective to secure a legally enforceable waiver of Fifth Amendment guarantees against self-incrimination, such ineffectiveness is alone sufficient to justify the employer's failure to advise an employee that his testimony will not be used against him, or is otherwise relevant to a determination of what Fifth Amendment guarantees are to be accorded an employee.

3. Whether an *explicit* demand by a public employer for an *express* waiver of constitutional guarantees against self-incrimination provides the sole justification for an employee's refusal to give coerced testimony or to otherwise invoke the Fifth Amendment's protection.

4. Whether the court below erred in determining that the questions to be asked of petitioners were specifically, directly and narrowly related to the performance of official duties, *i.e.*, whether a municipal defendant may ask questions, on penalty of job forfeiture, which by respondents' admission do not relate to the job functions of petitioners or to the performance of official job duties.

## PARTIES BELOW

The caption of the case in this Court contains the names of all parties to the proceedings before the United States Court of Appeals for the Fifth Circuit.

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*vs.*

MONROE MCCORKLE, ET AL.,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Charles Gulden and Richard Sage, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 21, 1982, with rehearing denied by written opinion on September 10, 1982.

## OPINIONS BELOW

The initial opinion of the Court of Appeals is reported at 680 F.2d 1070, and is set forth in Appendix "A." The opinion on rehearing is reported at 685 F.2d 157, and is set forth in Appendix "B."

The opinion of the district court is set forth in Appendix "C."

## JURISDICTION

The opinion of the Court of Appeals was entered on July 21, 1982. A timely petition for rehearing was denied by written opinion on September 10, 1982. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved in this proceeding is the Fifth Amendment of the United States Constitution, which in pertinent part provides:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

## STATEMENT OF THE CASE

This action was filed by Charles Gulden, *pro se,* and Richard Sage, *pro se,* on August 21, 1978, requesting, among other things, injunctive relief against the City of Dallas, Texas, through its agents, Monroe McCorkle and George Dickerson. Petitioners sought to restrain respondents from violating their Fifth Amendment guarantees against self-incrimination by coercing petitioners to submit to lie detector tests on penalty of job loss. By order signed August 25, 1978, the district

court denied petitioners' request for temporary injunctive relief.[1]

On August 25, 1981, three years to the day that the request for temporary injunctive relief was denied, the district court issued its Findings of Fact and Conclusions of Law, denying all relief sought by Gulden and Sage. Appendix C, at 11-12. On September 2, 1981, petitioners moved for additional findings of fact, which respondents did not oppose by the filing of a response thereto. On September 28, 1981, the motion was denied. On July 21, 1982, the Fifth Circuit affirmed the district court, and by written opinion of September 10, 1982, petitioners' request for rehearing was denied.

Since 1974 and 1973, respectively, Gulden and Sage were employed by the Property Management Division of the City of Dallas' Public Works Department. At the time of their firings on August 29, 1978, both were classified as Right-of-Way Agents, whose job functions and duties consisted of negotiating the acquisition of property for use by the City (R.II, 11-12). Both were considered "outstanding" employees (R.II, 119, 143). During the material times of their employment, respondent McCorkle was the director of the Public Works Department (R.II, 8) and respondent Dickerson

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[1] The sworn Original Complaint, which alleged "a clear violation of plaintiffs [sic] rights against self-incrimination under the 5th Ammendment [sic]" (R.I, 3), was filed eight days prior to petitioners' firings of August 29, 1978. The denial of the temporary injunction took place four days before petitioners were fired.

was his assistant for the Property Management Division (R.II, 9).

In the afternoon of August 14, 1978, a bomb threat was phoned in to the Dallas Employees Credit Union, Mockingbird Street location (R.II, 12-13). The credit union, which is not a part of the Public Works Department, is located at the opposite end of the building from public works (R.II, 13). The particular City facility involved houses numerous municipal departments with 500 or more employees throughout (R.II, 10-11). As reported to police, the threat was thought to have been made by a black male (Pxs 1, 32). Both plaintiffs are white (R.II, 17). Earlier that same day a man phoned the Lemmon Avenue branch of the credit union and had suggested to personnel there that an employee of the Mockingbird branch had been the subject of a robbery (Px 32).

During a certain time period substantially predating the time of this threat, pranks had been played on various Public Works Department employees. These pranks consisted of such things as the sending of phony valentines, turning off lights in offices, passing a fake marriage license around the office, etc. (R.II, 23-24; 117-18). Even plaintiffs were recipients of such pranks (R.II, 60-61).

According to the testimony, it was the existence of these pranks (which had apparently stopped a significant time prior to the threat) that provided the sole and only reason for McCorkle, through

Dickerson, to demand that the few employees of the Property Management Division take lie detector tests (R.II, 22), although even in McCorkle's mind there was the recognition that "a bomb threat is far more serious than a fake phone message or something like that . . . ." (R.II, 23; 61). The apparent reason for McCorkle's suspicion was that scheduled for the same afternoon as the threat was a retirement party for a former director of the Property Management Division (R.II, 24-25). The party, to which all departments in the building were invited (R.II, 25), was to occur in the cafeteria of the City facility. The cafeteria itself is located at the other end of the building from the credit union, to which the threat was made (R.II, 25). Attendance at the party was purely voluntary, and was by no means a job "duty" (R.II, 62).

On August 16, 1978, two days after the threat was made to the credit union, McCorkle presented a memo to each Property Management Division employee directing him or her to submit to a lie detector test and to sign a "waiver" in connection therewith (R.II, 27; Px 4).

Admittedly, the memo did not inform the employees of the specific questions that would be on the examination, nor were they advised how or in what fashion the information derived from the polygraphs would be used (R.II, 27-18). Attached to the memo was a "waiver" which each employee was required to execute (R.II, 14; Pxs 4, 8). Somewhat less than specific, the "waiver" provided for

particular employees to "give my consent to..... ..... to conduct this polygraph examination concerning the subject matter previously discussed" (R.I, 57; Px 8). The subject matter of the discussion was apparently the bomb threat (R.II, 15). There was no assurance that the results of the polygraph would not be used for criminal prosecution purposes (R.II, 28; Px 4). In fact, even McCorkle admitted that at the time he did not intend to limit the results to any particular or specific purpose (R.II, 15-16; 166-68). Prior to issuing the memo and tendering the waiver form, McCorkle had not discussed the matter with any employees of the division (R.II, 21). McCorkle himself agrees that the waiver he tendered to employees had an aspect of voluntariness about it, even though it was intended that the employees have no choice in the matter (R.II, 27).

On August 17, 1978, the day of the issuance to employees of the memo with the waiver, McCorkle learned that the outside polygraph firm employed to administer the exams was requiring examinees to execute an additional form, entitled "Consent to Polygraph Examination and Release of Liability" (R.II, 28-29; Px 7). This did not change McCorkle's insistence that employees submit to the test (R.II, 28), even though the second waiver, once signed, would falsely indicate that the employee "voluntarily consent[s] to this examination of my own free will, and . . . no duress, threats, or coercion have been placed upon me . . . ." but would

truly indicate that "I have not been promised . . . immunity . . . ." (R.II, 29; Px 7). After it was learned that the polygraph examiner would require this additional waiver or consent, Dickerson began passing them out to employees and telling them to sign (R. II, 104). Although petitioners had become aware of the additional document, and knew they would have to sign it, Dickerson did not tender a copy to them (R.II, 105; 141). When the plaintiffs declined to execute the waivers, they were placed on administrative leave (R.II, 106; 141; Pxs 5, 6). Interestingly, two other employees who refused to execute the waivers were not subjected to discipline (R.II, 36; 141; 155-57). Some four days later, August 21, 1978, this action was filed by Gulden and Sage without assistance of counsel (R.I, 1-6). It alleged that respondents were attempting to deprive them of their Fifth Amendment rights (*Id.*). Three days after the filing, petitioners received from McCorkle a memo, dated August 24, 1978, directing them to report to the Dallas Police Department for lie detector tests (R.II, 107; Pxs 12, 13). Nothing in the directive purported to exclude petitioners' lie detector results from use by that department for criminal investigation (R.II, 108; 147; Pxs 12, 13). Those taking the police polygraph were required to sign one of two waiver forms (Pxs 19, 24). Petitioners again refused to sign waivers and submit to polygraph examinations under these circumstances, and, by letter of August 29, 1978 (R.II, 102; Pxs 14, 15, 16), they were fired. Four days previous, the district court had denied

their request for temporary injunctive relief.

Little, if any, concern was exhibited by either McCorkle or Dickerson about the position in which petitioners were placed, namely, having been directed, on penalty of job loss, to appear at the police department and take polygraphs, the results of which were not restricted to administrative use only, and the questions for which petitioners had not been told.

> Q. The day that . . . you had their suit in hand, they have consistently maintained that they felt that that would result in a waiver of their Fifth Amendment rights?[a]
>
> A. Correct, sir.
>
> Q. Do you think that's unreasonable, Mr. Dickerson?
>
> A. Yes, sir.
>
> * * *
>
> Q. But you tell me today [,Mr. Dickerson,] that you did not know the legal effect of those instruments [that plaintiffs were told to sign]; is that correct, sir?
>
> A. That's true. I'm not an attorney . . . .
>
> Q. You'll agree that the right against self-incrimination is a very delicate and important right, would you not, sir?

[a] Plaintiffs' Exhibit 11 makes clear that Dickerson knew of the suit no later than August 22, 1978 — the day after it was filed.

A. I would say so, sir.

Q. Now, for the record, you thought it was unreasonable for these two gentlemen to assert this concern over the possibility of waiving their rights?

A. . . . I thought that idea had no merit.

* * *

Q. Now do you feel that their concern might have been a little bit legitimate?

A. Not in my opinion.

(R.II, 165-68). While the management personnel responsible for the polygraph tests were uncertain as to what self-incrimination implications would follow for the examinees, these same personnel nevertheless penalized petitioners for a similar, though genuine ignorance (R.II, 161-62).

It is clear and undisputed that the refusal to submit to polygraph examinations administered by the Dallas Police Department led to petitioners' firings. It is similarly undisputed that at no time were petitioners advised that any evidence they might give would not be used in a criminal investigation or prosecution (R.II, 28; 108; 147; Pxs 4, 5, 6, 7, 8, 12, 13, 14, 15). Nor were Gulden and Sage told the specific questions to be asked on the exams,

but only that the exams would generally concern the "bomb threat" (R.II, 27-28).[3]

During the course of these events it was apparent that there was an ongoing police department investigation of the threat. In fact, McCorkle himself spoke to a police lieutenant about it on the very afternoon the threat was made (R.II, 16). In his meeting with employees on August 17, 1978, Dickerson, too, made clear that "there is an ongoing police investigation" (R.II, 103, 107; 142). He had spoken with a police officer specifically about the petitioners (R.II, 74, 76), and the officer's report of August 22, 1978 (Px 11), refers to Gulden and Sage as "suspects." Even the independent polygraph examiner admitted to a Property Management Division employee that the City "had a couple of people in mind" (R.II, 206).

A more telling instance, however, is that the police officer by whom petitioners were to have had their polygraphs administered was sending his reports on Property Management Division employees directly to the Chief of the Dallas Police Department, not to Public Works (R.II, 201; Pxs 21, 26).

Q. Is it customary [,Mr. Dickerson,] for

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[3] The letters of discharge of August 29, 1978 (Pxs 14, 15), were the first items of correspondence wherein either McCorkle or Dickerson mentioned to petitioners that the polygraphs were for administrative use. Not even then, however, did McCorkle limit their use to that purpose only. Also, those letters provided the first mention that the questions that *would have been asked* were to be "narrowly drawn." Of course, the questions had never previously been discussed with petitioners (R.II, 27-28). They were only told they would be asked questions about the general subject of the bomb threat (Pxs 4, 5, 6, 12, 13).

> the chief of police to get involved in a purely administrative matter within a division of a department, to your knowledge?
>
> A. Not to my knowledge, no, sir.

(R.II, 78). In reality, the test results were never to be limited to administrative use (R.II, 32-33).

> Q. And then what we have is, when [the petitioners] declined to just go into the police department and talk about this bomb threat, that you admit had nothing to do with the performance of their specific duties, you fired them?
>
> A. Terminated for refusing to do what I had told them to do.

(R.II, 33).

## REASONS FOR GRANTING THE WRIT

### I.

It is petitioners' view that the Fifth Amendment, with its guarantees against self-incrimination, requires that a public employer tender "immunity" when it seeks to coerce testimony from an employee under threat of job loss. In other words, at the time testimony is demanded, the Amendment requires that the employee be advised that his compelled testimony will not be used against him in subsequent criminal proceedings, and the failure

to provide such assurance justifies his refusal to answer and protects him against dismissal.

To the contrary, the Fifth Circuit has now held that the Fifth Amendment does not require a public employer to advise an employee that his compelled testimony will not be used against him in subsequent criminal proceedings *before* he is required to testify under threat of job forfeiture, and in so doing has apparently adopted the decision of the trial court, that "[t]he Fifth Amendment does not require that an employee be advised that evidence obtained as a result of his testimony will not be used against him." *See* Appendix C, at 10.

By any analysis, such a holding is contrary to all existing authority. In *Gardner v. Broderick*, 392 U.S. 273 (1968), this Court, without dissent, held as follows:

> Our decisions establish beyond dispute the breadth of the privilege to refuse to respond to questions when the result *may* be self-incriminatory, and the need fully to implement its guaranty. . . . Answers may be compelled regardless of the privilege *if there is immunity* from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying . . . .

*Id.* at 276 (citations omitted; emphasis added).

In *Gardner* the Court further held:

> If appellant, a policeman, had refused to answer questions specifically, directly, and

> narrowly relating to the performance of his official duties, *without being required to waive his immunity* . . . the privilege against self-incrimination would not have been a bar to his dismissal.

*Id.* at 278 (footnote ommitted; emphasis added).

The fact that the conduct of a public employer may not have resulted in an actual waiver is obviously unimportant, for

> Petitioner could not have assumed — and certainly he was not required to assume— that he was being asked to do an idle act of no legal effect. In any event, the mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment.

*Id.* at 279. The *Gardner* holding was reaffirmed in the companion case of *Uniformed Sanitation Men Ass'n v. Comm'r,* 392 U.S. 280 (1968). Thereafter, a series of lower court opinions construed the holdings of *Gardner* and *Sanitation Men.* In *Confederation of Police v. Conlisk,* 489 F.2d 981 (7th Cir. 1973), *cert. denied sub nom., Rochford v. Confederation of Police,* 416 U.S. 956 (1974), the Seventh Circuit, after careful analysis, stated as follows:

> In sum, then, the *Gardner* and *Uniformed Sanitation Men* decisions indicate that a public employer may discharge an em-

> ployee for refusal to answer where the employer both asks specific questions relating to the employee's official duties *and* advises the employee of the consequences of his choice, *i.e.*, that *failure to answer will result in dismissal but that answers he gives and fruits thereof cannot be used against him in criminal proceedings.*

489 F.2d at 894 (emphasis added). This is nothing more than what Judge Friendly had previously noted in *Uniformed Sanitation Men Ass'n v. Comm'r*, 426 F.2d 619, 627 (2d Cir. 1970), *cert. denied*, 406 U.S. 961 (1972), when he declared that a public employee must be "duly advised of his options and the consequences of his choice."

In *United States v. Devitt*, 499 F.2d 135 (7th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975), the Seventh Circuit again was presented the opportunity to address the issue, and it aptly and succinctly summarized the rule of law imposed as a result of *Gardner*, *Sanitation Men* and *Confederation of Police*:

> [D]isciplinary action [may not] be taken against the witness for his refusal to testify, *unless he is first advised that . . . evidence obtained* as a result of his testimony *will not be used against him* in subsequent criminal proceedings.

499 F.2d at 141 (emphasis added).

Were these authorities not sufficient support for the panel, then it had the benefit of this Court's recent pronouncement in *Lefkowitz v. Cunning-*

*ham,* 431 U.S. 801 (1977). In an opinion by Mr. Chief Justice Burger, the Court reiterated what the Fifth Circuit has apparently overlooked, that "since the test is whether the testimony might later subject the witness to criminal prosecution, the privilege is available to a witness in a civil proceeding, as well as to a defendant in a criminal prosecution." 431 U.S. at 805.

> In either situation the witness may "refuse to answer *unless and until he is protected* at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant."

*Id., quoting Lefkowitz v. Turley,* 414 U.S. 70, 78 (1973) (emphasis added). After reviewing prior authority the Court stated:

> These cases settle that government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony *which has not been immunized.*

431 U.S. at 806 (emphasis added). Apparently "these cases" did not settle that issue for the lower courts, though even in his dissent in *Cunningham,* on other grounds, Mr. Justice Stevens acknowledged the obvious:

> The *failure to tender immunity was the critical missing element which invalidated the discharges* of the policeman and the sanitation men in *Gardner v. Broderick* . . . and in *Sanitation Men v. Comm'r* . . . .

431 U.S. at 814 n.12 (emphasis added). The Fifth Circuit discounted Mr. Justice Stevens' assessment with the astounding remark that "a 'tender of immunity' . . . has never been an explicit or implicit condition of the relevant holdings." Appendix A, at 13 n.10.

The decision of the Fifth Circuit stands at odds with all prior authority, and it heralds an era where indiscriminate use of public employee interrogation may be utilized to aid in criminal prosecutions. The requirement that one be advised that his testimony will not be used against him is no mere accident of the law. Simply put, the requirement is necessitated by the fact that in the civil context there is no absolute right to silence that may be invoked without impairing the (employment) status of the one invoking the right.

The district and circuit courts have refused to see this basic distinction, to such an extreme that they apparently concur that an employee need only be advised that his testimony *will* be used against him. *See* Apprendices C, at 10-11; A, at 8. This is, of course, the rule in criminal, not civil proceedings. Application of such a notion to the civil setting renders the holdings of *Lefkowitz, Gardner* and *Sanitation Men* absolutely meaningless. One cannot conceive of a situation where a public employer advises an employee that what he says *will* be used against him and at the same time tenders immunity.

The requirement of a tender of immunity, which

the panel implies may not exist, is so clear that on appeal respondents did not urge the contrary! The rule required by precedent, far from allowing an employee "to circumvent an investigatory proceeding," Appendix A, at 15, is one designed to protect Fifth Amendment guarantees. With all deference to the panel, once an employee is assured that his testimony will not be used against him, there is no way to circumvent an investigatory proceeding short of job forfeiture.

On rehearing the Fifth Circuit made a feeble attempt to retreat from its holding. It did so by saying that while a public employer *may* in some circumstances and "at some point" be required to advise an employee that his compelled testimony cannot be used against him in a criminal prosecution, the facts before the court "do not indicate even the existence of a particularized, specific inquiry in which questions of immunity could be properly framed." Appendix B, at 2. In other words, said the court, "the inquiry had not advanced to a level of specificity in which the competing concerns of immunity could be properly addressed . . . ." Appendix B, at 3.

With appropriate respect, to argue that the inquiry about the bomb threat had not advanced to a level of specificity so as to require respondents to address the immunity issue is to ignore reality. Here was a situation involving a bomb threat, about which petitioners, determined by the police to be "suspects," had been ordered to the police

department to provide answers which were forwarded to the Chief of Police, not to the Department of Public Works.

To ignore the reality of such circumstances and the genuine Fifth Amendment concerns they generated clearly evidences the desire of the Fifth Circuit to reach a wanted result, and then reason in reverse to support it. What the Fifth Circuit would apparently require is that each question be asked, the employee refuse to answer, then immunity be tendered. Neither *Gardner* nor its progeny envision such a mechanistic application of the principles they establish.

A public employee must be advised of his options and the consequences of his choice at the time he is ordered to testify. Any other result fails to insure that the employee's choice is meaningful, and the only "benefit" of failing to so advise at the time the demand is made is to allow an employer to coerce a forfeiture of the employee's job.

In light of the panel opinions, the Hobson's choice now is *not* compelled answers in combination with a compelled waiver of immunity, Appendix A, at 10; the choice is between absolute coerced submission to questioning without assurance that the evidence obtained will not be used to prosecute, on the one hand, and loss of employment, on the other.[4]

[4] It is imperative that one understand what the district court held and what the Fifth Circuit affirmed. The trial court—directly contrary to all precedent—held that "[t]he Fifth Amendment does not require that an employee be advised that evidence obtained as a result of his testimony will not be used against him." Appendix C, at 10. The Fifth Circuit clearly affirmed this erroneous holding. Appendix A, at 8.

The Fifth Circuit must be overturned.

## II.

Closely akin to the issue set forth above is that now presented. Petitioners, with this Court in agreement, contend that even though no legally effective waiver of Fifth Amendment guarantees against self-incrimination would have resulted from compliance with respondents' demands, this fact is of no significance. This ineffectiveness, in other words, will not in and of itself justify an employer's failure to advise an employee "of his options and the consequences of his choice." *Uniformed Sanitation Men Ass'n v. Comm'r*, 426 F.2d 619, 627 (2d Cir. 1970), *cert. denied*, 406 U.S. 961 (1972).

The lower courts clearly held a contrary opinion, agreeing with the district court that the holding of *Garrity v. New Jersey*, 385 U.S. 493 (1967), prohibiting the use of compelled testimony in a later criminal prosecution, serves as an adequate safeguard. Appendices A, at 13; C, at 11. In the final analysis, "[a]ny answers given by [Gulden and Sage] could not, under *Garrity*, be used against them." Appendix A, at 15.

The fact that petitioners could subsequently renew their constitutional objections if testimony was used against them *does not* eliminate the need for employer compliance with Fifth Amendment mandates in the first instance where, as here, the compulsion is initiated in a prior, allegedly administrative inquiry. Nevertheless, the present issue

has been authoritatively answered contrary to the holding of the panel and the district court.

> [T]he mandate of the great privilege against self-incrimination does not tolerate the attempt, *regardless of its ultimate effectiveness,* to coerce a a waiver of the immunity it confers on penalty of the loss of employment.

*Gardner v. Broderick,* 392 U.S. 273, 279 (1968) (emphasis added); *accord, Uniformed Sanitation Men Ass'n v. Comm'r,* 392 U.S. 280, 284 n.15 (1968) (later ineffectiveness of waiver does not eliminate the need to safeguard Fifth Amendment guarantees). In practical effect, what the panel has held is that given the protection afforded in *subsequent criminal proceedings* by virtue of *Garrity,* few, if any, self-incrimination safeguards need be enforced or recognized in previous, purportedly *civil investigative proceedings.* Particularly is this apparent when viewed in light of the panel's holding that a public employer need not advise an employee that testimony elicited from him will not be used against him in circumstances presented here. The net result is to afford the employee no Fifth Amendment self-incrimination protections when his testimony is demanded—clearly a result contrary to all precedent. Too, should the panel be correct, *Gardner, Sanitation Men* and their progeny, including *Lefkowitz v. Cunningham* (which has reaffirmed the

proposition that the ineffectiveness of a waiver is not controlling) are rendered meaningless.[8]

The panel opinion must be reversed.

## III.

In addition to the previous erroneous holdings, the panel clearly appears to hold that one may properly invoke Fifth Amendment guarantees against self-incrimination and decline to answer questions without fear of job loss only when the employer makes an *explicit* demand for a waiver, or *expressly* requires a relinquishment of Fifth Amendment protections. *See* Appendix A, at 11-14.

Petitioners are aware of no authority for the proposition that one's Fifth Amendment protections become operative only in the event that an employer *expressly* or *explicitly* demands a relinquishment of those protections. To the contrary, the repeated failure to tender immunity can and should be construed by an employee as an attempt by his employer to gain not only an administrative accounting of his public trust (which is permissible under certain circumstances), but also as an attempt to gain information which can be used to prosecute him criminally. *See Gardner v. Broderick, supra,* 392 U.S. at 279. To paraphrase *Gardner,* if the former had been the only purpose of the demand for testimony, there would have been no reason for

[8] Again it is important to understand the holding of the district court, namely, that petitioners' "constitutional rights would have been adequately protected by [the] holding in Garrity . . . ." Appendix C, at 11. The Fifth Circuit clearly affirmed this irrelevant proposition. Appendix A, at 13-15.

failing to advise the employee that his testimony would not be used against him in criminal proceedings. *Id.*

The repeated failure to advise Gulden and Sage of the consequences of their actions is but one element that supports the view that the testimony sought might be used to prosecute them criminally. More important is the fact that throughout the events leading to termination there was an ongoing police investigation, in which petitioners had been fingered as "suspects" (Px 11), apparently by the persons who demanded they take polygraphs (*Id.*). If there was any doubt about the use of testimony for criminal prosecution, it was erased when petitioners were ordered to the Dallas Police Department for questioning concerning the bomb threat, with the results of the questioning reported *not* to the Public Works Department but to the Chief of Police (R.II, 201; Pxs 21, 26). Finally, at no time *prior* to their terminations were petitioners informed that the testimony was required to seek an accounting of their official duties as opposed to being used for criminal prosecutions. Even at trial some years later the person ordering the polygraph examinations acknowledged that use of the results was not confined to administrative use (R.II, 28, 32-33, 78; Px 4). In truth, what was taking place was an unbridled witch-hunt, which the lower courts have now found permissible.

These events point to the indisputable conclusion, ignored by the panel, that coercion of a waiver

(actual or "purported," *Gardner, supra,* 392 U.S. at 279) of Fifth Amendment guarantees (regardless of the effectiveness) may be accomplished not only by words but also by deeds; the demand may be implicit as well as explicit.

The panel opinion must be reversed.[a]

## IV.

The trial court also concluded that the questions to be asked of petitioners were "specifically, directly and narrowly [related] to the performance of their public duties . . ." (R.I., 87; Appendix C, at 11), in accordance with *Gardner* and *Sanitation Men, supra.* Such holding was affirmed by the Fifth Circuit. Appendix A, at 16-17.

It is petitioners' view that polygraph questions which relate to a bomb threat made to another department of the City for the alleged purpose of disrupting a voluntary retirement party at which attendance is not mandatory, as a matter of law are not specifically, directly and narrowly related to the performance of petitioners' official duties as Right-of-Way Agents. Particularly is this the case

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[a] Petitioners disagree with the panel's assertion that "[t]he facts before us, do not indicate even the existence of a particularized, specific inquiry in which questions of immunity could be properly framed." Appendix A, at 14-15 (footnote omitted). How the inquiry (being ordered to report to the police department for questioning about a specific bomb threat then under investigation by the police) could be any more specific, petitioners are unaware. This language also reveals the unfortunate fact that the panel believed that the tender of immunity in civil investigations must somehow bear the formal trappings of immunity grants in criminal proceedings. The "tender of immunity" in proceedings such as are in question here, however, is but the equivalent of advising the employee of his options and the consequences of his choice. *See Uniformed Sanitation Men Ass'n v. Comm'r,* 426 F.2d 619, 627 (2d Cir. 1970), *cert. denied,* 406 U.S. 961 (1972).

when an employee is not advised what the questions will consist of.

It is true that if one is advised that the testimony he gives will not be used against him, and of the consequences of his refusal "to answer questions specifically, directly, and narrowly relating to the performance of his official duties," he may be subjected to discharge. *Gardner v. Broderick, supra,* 392 U.S. at 277. The fact that the questions in the present case (which petitioners never saw) did not meet this exacting standard is illustrated by respondent McCorkle himself:

> Q. . . . What did the bomb threat have to do in the performance of official job duties?
>
> A. None whatsoever as far as I'm concerned.

(R.II, 20). No other conclusion could be reached in light of the fact that attendance at the retirement party was not an official job duty, not to mention that any questioning concerning the event would hardly be "directly" related to job duties. To put it another way, to what official job "duty" were the questions "specifically", "narrowly" *and* "directly" related? The best argument McCorkle could muster by trial time was that the threat was somehow related to employee "morale," which in turn was related to general job performance (R.II, 19). This is wholly inconsistent with the statement quoted above made in February, 1979 (R.II, 20). When confronted with his previous statement,

however, McCorkle did not disavow it (R.II, 20-21). And if that did not make it clear, McCorkle re-emphasized what was apparent to all:

> Q. We already know that this investigation didn't concern the performance of their official duties as Right-of-Way Agents, correct? You have previously testified to that, have you not?
>
> A. Right.

(R.II, 32). Nevertheless, if McCorkle's testimony was insufficient to establish that fact, then respondent Dickerson's surely was not (R.II, 68). Petitioners, in the first instance, are not only unable to draw a connection between the official job duty defendants sought to investigate in this cause and the questions defendants proposed to ask, but they are also at a loss to understand what job duty, if any, is involved.[7]

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[7] In Findings of Fact 19, 20 and 26, (Appendix C, at 6, 8) the court failed to employ the test established by this Court regarding the need for relation between the questions asked and the employee's "official duties." First, the district court neglected to employ the language official duties"; instead, the court saw the issue to be whether the questions were merely "job-related" (R.I. 84, Finding of Fact No. 20). In Finding No. 26, the court preferred to utilize a relationship between the questioning and "their duties." Petitioners contend that the repeated use of the word "official" by this Court is not mere surplusage.

Moreover, Fact Finding 19 makes clear that the trial court felt the relationship must be between the questions to be asked and the incident involved—the bomb threat. This is an obvious misapplication of the proper standard, and one which the Fifth Circuit adopted. The cases make clear that the relationship must exist between the questioning and the official duties—not between the questioning and the general incident (e.g., a "bomb threat," "fraud," "extortion," "murder," etc.) giving rise to the demand for a polygraph.

In Conclusion of Law No. 2 (Appendix C, at 9-11), the court again employs the "job-relatedness" test, and in Conclusion No. 4 Appendix C, at 11) the court speaks in terms of "public" duties rather than "official duties." The Fifth Circuit upheld these determinations. Appendix A, at 16-17.

## CONCLUSION

The Fifth Circuit has charted a course far distant from that established by authoritative Supreme Court precedent. For the reasons set forth above, a writ of certiorari should issue to review the opinions of the Court below.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that three true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was forwarded to attorney for respondents, Joseph G. Werner, on the 6th day of December, 1982.

Kenneth H. Molberg